IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2733 OF 2004

1. Singhal and Brothers,
Engineers and Contractors,
a Partnership Firm, having office
at 86/646, M.H.B. Colony,
Malad (East), Mumbai 400 097.

2. Pramodkumar Goel,
a Partner of Singhal & Bros.
of Bombay, Hindu Inhabitant,
carrying on business at 86/646,
M.H.B. Colony, Malad (East),
Mumbai 400 097.

Versus

1. Mahanagar Telephone Nigam Ltd.
Bombay Telephones, through a
Government of India Enterprises,
Telephone House, 15th Floor,
M.T.N.L. Prabhadevi,
Mumbai 400 028.'

2. The Chief General Manager,
Mahanagar Telephone Nigam Ltd.
having his office at Telephone House,
15th Floor, M.T.N.L. Prabhadevi,
Mumbai 400 028.

3. The General Manager (CCS), (PB),
Mahanagar Telephone Nigam Ltd.
having his office at Telephone
House, 16th Floor, M.T.N.L.
Prabhadevi, Mumbai 400 01.

4. Deputy General Manager (CC-S)III,
Mahanagar Telephone Nigam Ltd.
having his office at Telephone
House, 16th Floor, M.T.N.L.
Prabhadevi, Mumbai 400 028.

Mr. Milind Vasudeo with Ms. Badra Dalal for
Petitioner.

Mr. S.R. Rajguru, for Respondents.

Dr. Virendra Tulzapurkar, Sr. Counsel as Amicus
Curiea.

CORAM : F.I. REBELLO &
S.P. KUKDAY,JJ.
DATED : APRIL 27, 2005

ORAL JUDGMENT (Per F.I. Rebello,J.):

. Rule. By consent heard forthwith.

2. The main question of law which arise in this petition is as under :

. Does the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996, have the jurisdiction to dismiss an application for constitution of an arbitral tribunal on the ground that it is barred by limitation or not made within a reasonable time.

. The relevant provisions of Section 11, read as under :

"11. Appointment of arbitrators : (1) ..

(2) ..

(3) ..

(4) If the appointment procedure in sub section (3) applies and - (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the

two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub section (2), in an arbitration, with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, - (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub section (4) or sub section (5) or sub section (6) to the Chief Justice or the person or institution designated by him is final.

(8) ..

(9) ..

(10)..

(11)..

(12) ....."

3. A few facts may be set out :

. The Petitioner is a registered partnership firm of which Petitioner No. 2 is the partner. On or about 21.7.1994 Respondent No. 1 invited tender for the work of reinstatement of trenches and allied work in the year 1995-96. It is the Petitioner's case that they had carried out the work of reinstatement for trenches and allied work from 1.1.1995 to 22.2.1999 at various places. From time to time, petitioners submitted their bills for the work carried out to the concerned Sub

Divisional Engineer, Cable Construction at the respective places where the work had been carried out. Time and again the Petitioners demanded for payment and for which bills had been submitted to the respective area-wise Engineers. Various letters have been written by the Petitioners to the Sub Divisional Engineer. By letter of 27.8.1997, addressed to Respondent No. 4, the petitioner's had requested for payment of the outstanding bill and had submitted supplementary bill. It is the petitioner's case that the supplementary bills were passed in the concerned department. The bills were put up by the Accounts Officer to the Higher Authorities and were approved. However, inspite of the approval by the Finance Department and by the competent authority, the amounts are not paid. Certain guidelines were issued which have been fulfilled. The Accounts Officer promised to pay the amounts on or before March, 1996. But the same till date has not been paid. On the contrary the Accounts Officer has deducted amounts wherein the Petitioners are to receive higher amount as per the department guidelines. The Petitioner's have been put to unwarranted financial loss. Reference is then made to the correspondence exchanged from time to time and letter dated 11.6.2001 by the Chief Manager informing the Petitioner's that the matter

has been examined from the old records. and that they would hear in due course. Petitioner by letter of 21.4.2003 addressed to Respondent Nos. 2 and 4 once again demanded the payment and requested to appoint an arbitrator. Relevant portion of the letter reads as under :

> "In view of the above persistent efforts - we have noted that MTNL has failed to appoint an Arbitrator as provided in the terms of the contract. WE are therefore, left with no other alternative than to make an application to the Chief Justice for appointment of an arbitrator under section II of the Arbitration and Conciliation Act, 1996.
>
> . In the circumstances we call upon your honour finally to refer the matter to the Arbitration as regards payment of outstanding amount to Rs.29,21,791 (Rupees twenty nine lakhs twenty one thousand, seven hundred ninety one) along with accrued interest thereon since 27.8.1998 as already intimated - or pay the said amounts forthwith."

. It may be mentioned that by a earlier letter dated 10.1.1998 Petitioners had called on the Chief Manager to settle the matter within 30 days or otherwise to appoint an arbitrator to settle the pending matter finally.

. It is the case of the Petitioner that as per Clause 25 disputes had to be referred to an Arbitrator to be appointed by the Chief General Manager or if there is no Chief General Manager, Administrative Head of the Department. As the respondent's had failed to appoint an arbitrator, petitioner's had applied under Section 11 of the Act being Petition No. 6 of 2004. That application has been dismissed and consequent whereupon the present petition.

4. Considering the importance of the issue, we asked Dr. Virendra Tulzapurkar to act as Amicus Curiea on behalf of the court, which the learned counsel graciously agreed to.

. On behalf of the Petitioners, it is submitted that the Chief Justice or designate or authority acting under Section 11 acts purely in administrative capacity. Once that be the case, the provisions of the Limitation Act, 1963 would

not be applicable. Even assuming without admitting that the principles can be extended by invoking doctrine of reasonable time, that issue can only be decided by the arbitral tribunal constituted under Section 16 of the Act. The issue of a claim being barred by Limitation is covered by the provisions of the Limitation Act as also the principles of reasonable time. The time for constitution of an arbitral Tribunal is not covered by the provisions of the Limitation Act and or by principles of reasonable time. The jurisdiction of the Chief Justice or designate under Section 11 is limited to only constitution of a tribunal where no tribunal is constituted or where there has been failure to nominate members to constitute the tribunal or fill in vacancy occurred in the constitution of a tribunal by a member resigning or being not available and on failure by the parties to nominate a member in such vacancy which has arisen. The learned counsel has referred to various judgements which will be adverted to the extent necessary.

. On behalf of the respondents, their learned counsel points out that the provisions of the Article 137 of the Limitation Act, 1963 would be attracted. Once that be the case, the application was clearly beyond the period provided by the

Limitation Act and consequently the order does not suffer from any error apparent on the fact of the record. It is pointed out that even assuming that the provisions of the Limitation Act, 1963 are not applicable, it is always open to the designate of the Chief Justice to consider whether the application was made within reasonable time. If not so made, the application can be rejected. It is pointed out that two learned Judges of this court in Nyaneshwar Bhiku Dhargalkar Vs. Executive Engineer, P.W.D. Works Division, II, Panaji, AIR 2000 BOMBAY 254 of the Panaji Bench and in Vishindas Bhagchand Versus Chairman, Maharashtra State Electricity Board and Ors. 2002 (1) Bom. C.R.320 the Nagpur Bench have taken a view that the application of appointment of arbitrator must be made within the period of limitation. Our attention is also invited to a judgement of a Division Bench of Jharkhand High Court in M/s.P.B. Enterprises, Engineers and Contractors, Burdwan, Vs. Eastern Coalfields Limited, Burdwan and Ors. AIR 2004 Jharkhand 71 where the learned Division Bench has also taken a view that the provisions of the Limitation Act would be applicable. It is pointed out that a statutory authority has to discharge his duties within a reasonable period and if not so done, the application for constitution of

the Tribunal would have to be rejected.

. The learned Amicus Curiea adverted to the provisions of Section 11 and the Judgement of the Apex Court in Konkan Railway Construction Vs. Rani Constructions (P) Ltd. 2002 2 S.C.C. 388 to point out that the Apex Court has now settled the issue as to the powers of the Chief Justice or designate under Section 11. It has now been held that the power exercised is administrative in character. The power under Section 11 can be exercised not only by the Chief Justice or Judge of the High Court but any other authority as contemplated under Section 11. The learned counsel then places reliance on the judgement in the case of Nityanand M. Joshi and Ors. Vs. Life Insurance Corporation of India and Ors. 1969 (2) Supreme Court Cases 199 to contend that the provisions of Article 137 would only apply to the proceedings before a court. The chief Justice or designated authority acting under Section 11 of the Act not being a court, Article 137 would not apply. In so far as moving the application within the reasonable period for constitution of the Tribunal, the learned counsel points out at the highest that may be a lacuna in the Act. It is not for this court in the exercise of its extra ordinary jurisdiction to fill in that

lacuna but for the legislature to correct the same if it feels it is so desirable.

5. With the above contention, we may now examine some of the provisions of the Act to consider the issue. Section 21 of the Act of 1996 reads as under :

> "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

. We may now refer to Section 43 sub sections (1), (2), (3) and (4).

> "(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.
>
> (2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies, shall be barred unless some set up to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would be otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to

the dispute so submitted."

. A conjoint reading of Section 21 and Section 43(2) of the Act will indicate that the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondents. The limitation of the claim will be considered as of that day. That would be the day which will have to be examined from the date of cause of action to determine whether the claim is within or barred by Limitation.

. Determination of an issue including as to determination or whether the claim is barred by limitation, whether there is arbitral clause and or the like, are purely within the jurisdiction of the arbitral tribunal under Section 16 of the Act of 1996. In our view, this issue is no longer res integra considering the judgement in the case of Hythro Power Corporation Ltd. Versus Delhi Transco Ltd. (2003) 8 Supreme Court Cases 35. In that case the issue was whether existence and validity of the arbitration agreement can be decided by the designate of the Chief Justice. The Apex Court considering the scope of Section 11 and Section 16 held that the order under Section 11 is an

administrative order and that the issue as to existence and validity of the arbitration agreement can only be decided by the Arbitral Tribunal constituted under Section 16 of the Act. A similar view has been taken in Secur Industries Ltd. Vs. Goderj & Boyce Mfg. Co. Ltd. and another, (2004) 3 Supreme Court Cases 447. Considering the scope of Section 16 of the Act, the Apex Court was pleased to observe that the arbitral tribunal has been given very wide jurisdiction to decide all issues. It was further observed that the authority of the tribunal under Section 16 of the 1996 Act, is not confined with the jurisdiction but goes to the very root of the jurisdiction. Having regard to the scope of authority of the arbitral tribunal under Section 16, on the facts of that case, the court held that the civil Court could not decide the issue. Even in a matter, if an issue arises, whether notice has been served satisfactorily, under Section 21, the matter has to be decided by the arbitral tribunal itself. It would therefore, be clear that all issues including procedural matters like whether there was proper notice under Section 21, or whether the claim is barred by limitation, whether there is arbitral clause, governing the subject matter of the dispute and whether the arbitral clause itself is subsisting or

valid are all issues which can be gone into under Section 16 of the Act of 1996 by the Arbitral Tribunal.

6. Having said so, we now come to the provisions of Section 11 of the Act of 1996. We are really concerned with sub sections (4), (5) and (6). A perusal of the said sub sections would show that on failure to follow the appointment procedure, on an application made to the Chief Justice or any person or institution designated by him, the arbitral tribunal can be constituted. Similarly where there is failure of the parties to appoint an arbitrator within 30 days from the receipt of request then also the Chief Justice or any person or institute designated by him can proceed to constitute the Tribunal. Similarly when there is failure of the appointment procedure under sub Section (6), the tribunal can be constituted in the manner set out therein. Perusal of Section 11 would make it clear that the section itself does not provide for any limitation in approaching the tribunal. That section confers a power on the Chief Justice or designate to constitute the tribunal. There is no power to decide the rights of the Parties. All claims including legal issues have to be decided by the Arbitral Tribunal as constituted. If the

section itself does not provide for any limitation, for constitution of a Tribunal, can the provisions of the Limitation Act 1963 be looked into. It is now settled law, that the provisions of the Limitation Act apply to courts and or to tribunals having the trappings of courts and to other tribunals to which provisions of the Limitation Act, 1963 are expressly made applicable. The object of the Limitation Act is to prevent Stale claims coming before the court. In the instant case, under Section 43 the provisions of Limitation Act are made applicable to Arbitrations as it applies to proceedings in court. The question that which arises is whether this would mean that the issue of limitation can be raised before the learned Chief Justice or his designate under Section 11 of the Act of 1996 and or whether they can take cognizance of the same. The provisions of Section 43(1) would be applicable on the commencement of the arbitral process as contemplated by Section 21 of the Act. On failure by one of the parties to take steps to constitute tribunal or nominate arbitrator as required, the Act has made provisions for the party to move under Section 11 for constitution of the Tribunal. This power is to complete a step in the arbitral process of constitution of a Tribunal. Considering Section

43, it will be open to the arbitral tribunal as constituted to consider the claim filed before it considering section 16 and to examine whether the claim is within limitation. If that be the case, will the provisions of the Limitation Act including Section 4 apply to an application moved under Section 11 for constitution of a Tribunal? In Rani Construction Ltd. (supra) the law has been declared that the power exercised by the learned Chief Justice or designate is an administrative power. The provisions of the Limitation Act, 1963 will not apply to proceedings before the learned Chief Justice or designate under Section 11 of the Act as it is not a court nor is it determining the rights of the parties. The provisions of the Limitation Act, if applicable, considering section 43 will only apply before an arbitral tribunal. The learned Chief Justice or his designate not being a court and considering the judgement of the Apex Court in Nityanand (supra), article 137 of the Limitation Act will not apply. The judgement of the Apex Court in Rani Construction Pvt. Ltd. has been considered by various subsequent judgements of the Apex Court. We may gainfully refer to the judgement in State of Orissa and Ors. Vs.Gokulnanda Jena, (2003) 6 Supreme Court Cases 465 where it has been reiterated that the order

made by the designated Judge is an administrative order. The next contention is whether considering Section 43 the provisions of the Limitation Act will apply. The language used is that the Limitation Act shall apply to arbitrations as it applies to proceedings in a court. In other words, as the provisions of the Limitation Act applies to suits filed before the Court in a like manner the provisions of the Limitation Act will apply to proceedings before the Arbitral Tribunal. The Chief Justice or designate is not the Arbitral Tribunal. The Chief Justice or designate can not decide the rights of the parties. The application under Section 11, is not to a court or Tribunal but to a body exercising administrative power.

7. Considering what is set out, we may now examine the judgement relied upon by the learned counsel for the respondents for the purpose of finding out whether they lay down the correct law. Nyaneshwar (supra) was decided in an arbitration application on 26.2.1999. Firstly therefore, it was disposed of in an application under Section 11 of the Act of 1996. That being the case, it can not be said to be a judicial order to which the doctrine of precedents would apply. However, considering that the order was passed by the designate of Chief

Justice, a sitting Judge of this Court, it would be necessary to consider the discussion. Firstly, the judgement was pronounced before the actual nature and extent and scope of Section 11 was decided by the Apex Court in Rani Construction. The learned designated judge had no occasion therefore, to consider that aspect of the law. The learned Judge thereafter proceeded to consider Section 43 of the Act of 1996 and for that purpose relied upon various judgements pronounced under the Act of 1940. Under the Act of 1940, the applications have to be made to the court for reference to the arbitration. Therefore, there is no difficulty in holding that under the Act of 1940, the court while considering an application for reference to an arbitral tribunal could have decided whether the claim was within limitation in a case where no evidence had to be led to decide a question. Limitation, being otherwise a mixed question of fact and law. The Judgment therefore, in Nyaneshwar (supra) can be differentiated.

. In Vishindas Bhagchand (supra) the judgement again was delivered on 7.9.2001. The judgement again was before the Apex Court pronouncing, on the true scope of the order passed under Section 11. There again it was an application made under

Section 11 of the Act of 1996. The learned Judge no doubt considered section 43 of the Act of 1996 and held that on the facts of that case, the claim was barred by limitation and consequently no reference can be made. This Judgement therefore, can also be differentiated.

. We then come to the Judgement of the Division Bench of the Jharkhand High Court. It is no doubt true that the judgement of the Apex Court in Rani Construction (supra) had been considered by the learned Judges of the Division Bench of Jharkhand High Court. The learned Judges referred to Section 21 and in Paragraph 9 of the judgement observed that the provisions of the Limitation Act, 1963 are applicable for the purpose of Request Case filed under Section 11(6) of the Act for appointment of arbitrator. The learned Judges thereafter proceeded to hold that Article 137 would apply. The order passed by the designate under Section 11 was therefore, upheld.

. We may note from these judgments that the matter has proceeded on the footing as if the Chief Justice or designate under Section 11 of the Act is the Arbitral Tribunal which is deciding the

reference or part of the arbitral proceedings. If the designate under Section 11 is an arbitral tribunal, then it may have been possible to take a view as taken by the learned Judges of this court as also by the learned Division Bench of Jharkhand High Court? The fact however, remains that the arbitral proceedings commence on the notice being served under Section 21 of the Act of 1996. It is merely because of the failure by one of the parties to nominate a member of the tribunal, or sole member to constitute the Tribunal, has the Act provided a mechanism for constitution of the Tribunal. The ambit of Section 11 is only to constitute the tribunal. A body clothed with a specific power cannot travel beyond the jurisdiction conferred on it. If it so does, it will be acting outside its jurisdiction as the order passed will be a nullity at law. The learned Chief Justice or designate does not have jurisdiction to decide on the merits or whether the claim is within limitation, as this is purely within the jurisdiction of the arbitral tribunal under the Act of 1996. The provisions of the Limitation Act, 1963 will not apply to proceedings before Chief Justice or his designate whilst considering an application under Section 11 of the Act. Constitution of the arbitral tribunal is

merely a step in the arbitral process. Once that be clear, as the power exercised by the Chief Justice or designate under Section 11, is purely administrative and the Chief Justice or designate has a limited jurisdiction to constitute the Tribunal, the provisions of the Limitation Act, 1963 would not be applicable. We are, therefore, unable to agree with the view taken by the two learned single Judges acting as designate of the learned Chief Justice and the view taken by the learned Division Bench of Jharkhand High Court.

8. We then come to the next contention as raised by the respondents that even if the provisions of the Limitation Act are not attracted, nonetheless, it will still be open to the Chief Justice or designate under Section 11 to have considered whether the application for constitution of the Tribunal has been made within reasonable time. For that purpose the learned counsel for the respondents has relied on the provisions of the Industrial Disputes Act, 1947. Reliance is firstly been placed in the case of M/s. Shalimar Works Limited Vs. Thier Workmen, AIR 1959 S.C. 1217 to contend that even though no limitation for reference is prescribed, it must be made within the reasonable time. A Similar view was taken by the

Apex Court in the case of S.M. Nolajkar and Others Vs. Telecom District Manager, Karnataka (2003) 4 Supreme Court Cases 27. On the other hand on behalf of the Petitioners, also learned counsel has placed reliance in the judgement of S.M. Nolajkar and Others (supra).

. Perusal of the judgements would indicate that even if there be no limitation, still considering the relief in the pending reference it is open to the tribunal to reject the relief on account of long delay. It may be mentioned that it is also settled law that the reference made after a long delay can be quashed. However, these are not authorities for the proposition that the designate under Section 11 can decide the issue. In the cases adverted to earlier, it was the tribunal constituted under the provisions of the Industrial Disputes Act which decided that aspect. Therefore, an issue as to whether the claim was made within reasonable period will have to be considered by the arbitral tribunal constituted under Section 16 and not by the designate under Section 11 of the Act. The Chief Justice or his designate cannot decide whether the claim is barred by Limitation. Consequently the doctrine of reasonable time cannot apply to an issue of constitution of tribunal if

otherwise there is no express provision for a time frame for constituting the tribunal. The learned counsel also relied upon the judgement in the case of Sharda Devi Vs. State of Bihar and another, (2003) 3 Supreme Court Cases 128, which was the judgement under the provisions of the Land Acquisition Act. The Apex Court therein was considering the scope and the power under Section 18 and 30 of the Land Acquisition Act. In the matter of exercise of power under Section 30, the Apex Court observed that though no limitation is provided for making reference under Section 30 of the Act, needless to say where no period of limitation for exercise of any statutory powers is prescribed, nevertheless, power has to be exercised within a reasonable period depending upon facts and circumstances of the case. In this case, the issue is whether a claim could be referred beyond a reasonable time by an authority competent to do so. What is the reasonable period in the given case was dependent on the facts and circumstances of each case. The Chief Justice or designate does not refer a claim. They only constitute the tribunal.

. In Municipal Council, Ahmednagar and another Vs. Shah Hyder Beig and Others, (2000) 2 Supreme Court

Cases 48, the issue before the Apex Court was about maintainability of the petition under Section 226 in the matter of an award passed under the provisions of the Maharashtra Regional Town Planning Act, 1996. The Apex Court was pleased to observe that the plea of laches will have to be followed where the challenge to the award is made after the period prescribed under the Limitation Act. That again will be by a court exercising its extra ordinary jurisdiction. The other judgement relied upon is in the case of Bibi Salma Khatoon Vs. State of Bihar and Ors. (2001) 7 S.C.C. 197. There again the issue was of applicability of provisions of the Limitation Act. That judgment really would not be biding.

9. The only question which could be considered is in the context of the Judgment in Sharda Devi (supra) which has taken a view that if the power is conferred on a statutory authority, that power must be exercised within a reasonable period. Can therefore, the learned Chief Justice or designate called upon to constitute the Tribunal under Section 11, proceed to hold that as the application for constitution of the tribunal or to fill in the vacancy has not been made within a reasonable time, they have discretion not to constitute the

tribunal. The power under Section 11 as explained, is to constitute the tribunal and is administrative in character. The power to nominate is pursuant to the terms of the contract between the parties. The party named under the contract is bound to nominate the tribunal on service of notice. If the party chooses not to nominate the Arbitrator to constitute the arbitral tribunal then an application invoking the provisions of the Act for constitution of arbitral Tribunal has to be made. Can the silence of the party for considerable period of time in making the application, on account of failure by the party who had to nominate the Arbitrator, or within reasonable time confers a power on the learned Chief Justice or his designate, whose only power is to constitute the tribunal, to dismiss the application for constitution of the Tribunal. Would the learned Chief Justice or his designate examine the conduct of the party responsible for failing to constitute the tribunal or nominate its arbitrator to constitute the Tribunal. This exercise could have been considered if the learned Chief Justice or his designate had the power to decide as to whether the application is made within reasonable time by examining the conduct of both the parties . In other words, it would have to act as a quasi

judicial authority and record a finding. It is no doubt true that, the order of the Chief Justice or delegate attains finality, pursuant to Section 11(7), in a matter proceeded under sub Section (4), (5) and (6) of the Act. That finality however is only to the constitution of the tribunal as contemplated by sub sections (4), (5) and (6). Once there is no power in the learned Chief Justice or designate to decide the rights of the parties, then whether the application is made within reasonable time or not, clearly being an administrative enquiry it will not be possible for the learned Chief Justice or designate to decide on the rights of the parties which it would in fact be doing by rejecting an application, on the ground that the application was not made within a reasonable period of time. Once that be the case, the concept of "within reasonable period" cannot be applied to an application made under Section 11 for constituting of the tribunal. We are therefore, clearly of the opinion that considering the nature and the power to be exercised by the Chief Justice or his designate under Section 11, it will not be open to the designate to decide whether the application was made within reasonable time. Secondly, as noted earlier, the appointment or nomination of arbitrator is only a step in the

arbitral process which commences on notice being served as contemplated by Section 21. It is no doubt true as pointed out on behalf of the counsel for the Respondents that in such cases a body like the respondents may loose its records and consequently in the absence of records, may not be able to establish its defence and be subjected to huge claims. That perhaps is a lacuna in the Act as rightly pointed out by the learned Amicus curiea. The said lacuna can only be filled in by the Legislature. It is not open to the learned Chief Justice or Designate or for that matter, this court in the exercise of its extra ordinary jurisdiction to fill in that lacuna by bringing in the concept of reasonable period which doctrine has been followed to bar reference of claims which are time barred. We are in agreement with the view expressed by the learned amicus curie. The lacuna if it be so, will have to be cured by an legislative enactment.

10. Having said so, we are clearly of the opinion that the impugned order is liable to be set aside. In the light of that rule made absolute in terms of Prayer Clause (b). Rule is also made absolute in terms of Prayer Clause (a). We direct Respondent Nos. 1 and 2 to constitute the arbitral tribunal

in terms of agreement dated 22.11.1994 on or before 31.7.2005. In the circumstances of the case, there shall be no order as to costs.

(F.I. REBELLO,J.)

(S.P. KUKDAY,J.)